No. 09-171

IN THE
Supreme Court of the United States

MICHAEL HALLIWELL & JAMES PARKER,

Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SONOMA,

Respondent,

CHRYSANTHE PAXINOS,

Real Party in Interest

On Petition for a Writ of Certiorari
To the California Supreme Court

PETITION FOR REHEARING

Michael J. Halliwell & James F. Parker
Defendants in Propria Persona
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November 4, 2009

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09-171 CERTIORARI REHEARING PETITION

Recent developments have further aggravated our deprivation of property and even liberty without any semblance of Due Process of Law. We have provided ALL of the court orders imposing one fees award on top of another, and there is not the barest reference to any facts of the case or any legal basis in any of them, for fees awards which now add up to more the $60,000. One could scan the transcripts for the hearings where the fees awards were made, and the appeals therefrom, and not find ONE WORD from Plaintiff's counsel (Charles Jensen) in support of these fees awards, and he has been equally silent in this Court's proceedings. As Defendants have noted previously, WE DO NOT SEEK PLENARY CONSIDERATION ON THE RECORD AS IT STANDS, BUT ONLY A FACT-FINDING REMAND TO FEDERAL DICTRICT COURT.

Rose v Mitchell (1979) 443 U.S. 545, 557 affirms:

> Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand.

Rose v Mitchell (1979) 443 U.S. 545, 561 affirms:

> But claims that the state judiciary itself has purposely violated the Equal Protection Clause are different. There is a need in such cases to ensure that an independent means of obtaining review by a federal court is available on a broader basis than review only by this Court will permit. A federal forum must be available if a full and fair hearing of such claims is to be had.

The circumvention of Defendants' March 10, 2009 appeal of a $19,000 attorney fees award cited in our October 13, 2009 Supplemental Brief is being further compounded by a "transcript slow walk," which has blocked Defendants' efforts to appeal an additional $9,000 attorney fees award (made without any discussion of the merits being allowed) by Judge Mark Tansil on September 1, 2009.

Gardner v California (1969) 393, U.S. 367, 369

explains why transcript access is an essential aspect

of Due Process for a self-represented defendant:

> It is argued that since petitioner attended the hearing in the Superior Court, he can draw on his memory in preparing his application to the appellate court. And that court, if troubled, can always obtain the transcript from the lower court. But we deal with an adversary system where the initiative rests with the moving party. Without a transcript the petitioner, as he prepared his application to the appellate court, would have only his own lay memory of what transpired before the Superior Court. For an effective presentation of his case he would need the findings of the Superior Court and the evidence that had been weighed and rejected in order to present his case in the most favorable light.

Gardner v California (1969) 393, U.S. 367, 370,

addresses an issue, linked to the "transcript slow

walk" still obstructing our appeals:

> Since our system is an adversary one, a petitioner carries the burden of convincing the appellate court that the hearing before the lower court was either inadequate or that the legal conclusions from the facts deduced were erroneous. A transcript is therefore the obvious starting point for

> those who try to make out a case for a second hearing.

In *Gardner v California* (1969) 393, U.S. 367, 370, the U.S. Supreme Court invalidates lower court proceedings because: "There is no suggestion that in the present case there is any adequate substitute for a full stenographic transcript."

1. Fraudulent fees awards lack finality

Most of the attorney fees in dispute are for simply reading (without furnishing any work product relating to these readings) Defendants' protests about the fraudulent tactics employed by Plaintiff's counsel.

Kenner v Commissioner of Internal Revenue (1968) 387 F.2d 689, 690-691 held:

> Finality accrues promptly after the exhaustion of the possibilities of direct review. In the instant case, the decisions became final in 1963 upon the expiration of the time allowed for filing a petition for certiorari to review our decision affirming the decision of the tax court. . . . . It has also been decided that where such finality is reached by lapse of the prescribed period after decision by

the Supreme Court it precludes further consideration by the Supreme Court on application for rehearing. (*Helvering v Northern Coal Company* (1934) 293 U.S. 191, 193; *Simpson & Company v Commissioner of Internal Revenue* (1944) 321 U.S. 225, 230)

Kenner (387 F.2d at 691) also notes:

We think, however, that it can be reasoned that a decision produced by fraud on the court is not in essence a decision at all, and never becomes final. It is most difficult to assume that Congress intended that a decision procured by fraud on the tax court could not be reached by any procedure in any tribunal, once the possibilities of direct review were exhausted. If a convincing case of palpable fraud on the court were presented, it is hard to justify a holding that it could not be considered. . . . .

There is a heavy burden both of particularized pleading and of proof upon the one who seeks to impeach an order or decree of a court. (Chicago Title & Trust Co. v. Fox Theatres Corporation (1960) 182 F. Supp. 18, 31) "There must be an offer to prove specific facts which will pretty plainly impugn the official record". [Citation] . . . .

"Fraud upon the court" should, we believe, embrace only "that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that

are presented for adjudication". (7 Moore's Federal Practice, 2d ed., p. 512, P60.23)

Toscano v Commissioner of Internal Revenue (1971) 441 F.2d 930, 933 observes: "So far as we know Kenner v Commissioner of Internal Revenue (1968) 387 F.2d 689, has not yet been criticized by any court." *Toscano* cites the *Kenner* holding that a decision obtained by fraud "can be set aside at any time because it is not a decision at all" and notes that this view is "strongly supported, as applied to the Court of Appeals, by the Supreme Court in Hazel-Atlas Glass Company v. Hartford Empire Company (1944) 322 U.S. 238, 248."

Universal Oil Products Co. v Root Refining Co. (1946) 328 U.S. 575, 580 affirms:

No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire

cost of the proceedings could justly be assessed against the guilty parties.

Chambers v NASCO, Inc. (1991) 501 U.S. 32, 44, cites the holding of *Hazel-Atlas Glass Co. v Hartford Empire Co.* (1944) 322 U.S. 238, 245, that a final judgment may be set aside "upon proofs that a fraud has been perpetrated on the court." *Chambers v NASCO, supra*, affirms the duty to safeguard the public from fraudulently begotten judgments and cites *Universal Oil Products Co. v Root Refining Co.* (1946) 328 U.S. 575, 580, affirming that "a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud."

2. Court's role in "liberty and justice for all"

The Court's October 13, 2009 and October 20, 2009 rulings in this case appear to be following Justice Roberts' **dissent** in *Precision Instrument*

Manufacturing Company v Automotive Maintenance

Machinery Company (1945) 324 U.S. 806, 820:

> The case ought not to have been taken by this Court. It involves merely the application of acknowledged principles of law to the facts disclosed by the record. Decision here settles nothing save the merits or demerits of the conduct of the respective parties.

Equal Justice Under Law is better served in the

Court's opinion in *Precision Instrument, supra*:

> The guiding doctrine in this case is the equitable maxim that "he who comes into equity must come with clean hands." This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. (324 U.S. at 814)

Our October 5, 2009 Motion to Judge Boyd re

Plaintiffs setting a premature OEX Hearing notes:

> In their September 26, 2009 Inquiries to Charles Jensen, Defendants set forth specifics of the march by Plaintiffs counsel, from violating the

> conduct rules for his profession, in Business & Professions Code § 6068(d), to outright criminal activity. . . . .
>
> The bogus back-dated documents discovered by Defendants on June 25, 2007, which had been inserted in the Case File as if they had been there since June 6, 2007, had the purpose of blocking any input by Defendants into the trial date setting process, contrary to the five day period for such input set forth on the Judicial Council's (www.courtinfo.ca.gov/selfhelp) website. . . . . Charles Jensen committed perjury with respect to his mishandling of Form UD-150, to avoid having to supply the information Defendants sought via Form UD-106 Interrogatories 71.7 & 77.1.

The fact that this file tampering and perjury eliminated Defendants' opportunity for discovery (and allowed an anonymous compilation of hearsay complaints to become the key factor in the jury's verdict), makes this passage from *Precision Instrument* (324 U.S. at 817) a close parallel: "The important fact is that Automotive had every reason to believe and did believe that Larson's application was fraudulent and his statements perjured." Since

tenants are a large part of the public, the subversion of their rights in Sonoma County Superior Court, makes this *Precision Instrument* (324 U.S. at 818) holding fully applicable to the remand to Federal District Court, which appellants here seek:

> Public interest demands that all facts relevant to such matters be submitted formally [to Federal District Court], which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent [denials of Due Process]. Only in that way can the [federal judiciary] and the public escape from being classed among the "mute and helpless victims of deception and fraud." (Hazel-Atlas Glass Co. v Hartford Empire Co. (1944) 322 U.S. 238, 246).

3. Right to federal Due Process protection

England v Louisiana State Board of Medical Examiners (1964) 375 U.S. 411, 415 affirms:

> There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.

England, supra, notes that review of state court rulings on federal matters only by a writ of certiorari may be inadequate, without an initial determination by a federal trial court. The opinion explains:

> This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims.

As an example, *England* cites litigation involving the Virginia Supreme Court, during that state's era of "massive resistance" to civil rights. In *Harrison v N.A.A.C.P.* (1959) 360 U.S. 167, 177, the U.S. Supreme Court sought to "spare the federal court of unnecessary adjudication" and sent the case back to Virginia courts for rulings which might "materially change the nature of the problem." *Harrison, supra,* adds: "The possibility of limiting interpretation,

characteristic of constitutional adjudication, also cannot be ignored."

N.A.A.C.P. v Button (1963) 371 U.S. 415, 428-429 upheld Appellant's challenge that Virginia's courts could not "construe and apply Chapter 33 to abridge the Freedoms of the First Amendment, protected against state action by the Fourteenth" so as to "infringe the right of the NAACP and its members and lawyers to associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed rights."

Appellants seek to rectify "massive resistance" to tenants rights by the Sonoma County Superior Court (a matter where fact-finding by a Federal District Court is of vital importance).

N.A.A.C.P. v Button (1963) 371 U.S. 415, 429-430 observes: "In the context of NAACP objectives, litigation is not a technique of resolving private

differences; it is a means for achieving the lawful objectives of equality of treatment. . . . It is thus a form of political expression. . . . And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."

4. Hollowing out of Due Process protections

Pernell v Southall Realty (1974) 416 U.S. 363, 385, affirms that a tenant's right to a (properly conducted) jury trial in eviction proceedings must not be brushed aside as a nuisance:

> A landlord-tenant dispute, like any other lawsuit, cannot be resolved with due process of law unless both parties have had a fair opportunity to present their cases. Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice be done before a man is evicted from his home.

On the crucial attorney fees issue (wherein the $375 standard fee for a normal court trial under

Local Rule 2.2E has escalated 160 fold), Defendants have been denied the barest semblance of a fair adjudication of the factual or legal basis for Charles Jensen's fees awards. Defendants are therefore within their rights to seek federal fact-finding. However, a strong minority of the Supreme Court has expressed the view that the High Court is scaling back its protection in this area.

In *Butler v McKellar* (1990) 494 U.S. 407, 424-425, a four-justice minority expresses the view that once-robust protection of federal constitutional rights is shriveling into insignificance:

> State courts essentially are told today that, save for outright "illogical" defiance of a binding precedent precisely on point, their interpretations of federal constitutional guarantees - no matter how cramped and unfaithful to the principles underlying existing precedent - will no longer be subject to oversight through the federal habeas system. . . . .
>
> This Court has never endorsed such a cramped view of the deterrent purpose of habeas review:

> we have always expected the threat of habeas to encourage state courts to adjudicate federal claims "correctly," not just "reasonably." . . . .
>
> And, as explained above, "correct" adjudication has always been thought to require courts to exhibit "conceptual faithfulness" to the principles underlying our precedents and thereby to anticipate reasonably foreseeable applications of those principles.

The dissenting justices in *Butler v McKellar* (1990) 494 U.S. 407, 427, 429, continue to refuse to "go gentle into that good night" and to "rage, rage against the dying of the light" (Dylan Thomas):

> Most significantly, the limited scope of the deterrence promised by the Court's holding today defeats Congress' purpose in establishing the scheme of federal habeas review of state criminal proceedings. Congress established such review because it perceived a potential "inadequacy of state procedures to raise and preserve federal claims [and was] concern[ed] that state judges may be unsympathetic to federally created rights." Kaufman v. United States (1969) 394 U.S. 217, 225-226. . . . .
>
> Moreover, Congress' insistence that "federal courts have the 'last say' with respect to questions of federal law" raised during state criminal proceedings, Kaufman, supra, at 225,

> cannot be satisfied by this Court's jurisdiction to review state proceedings directly. State courts are well aware that the "Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous." R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 4.17, p. 221 (6th ed. 1986).

As matters stand in our case, no state or federal court has lived up to the following mandate. Our last Update reminded the First District Court of Appeal that rights given unequivocal support in decisional law, still need enforcement to be a living reality.

> The rule itself is settled with scarcely any conflict. It is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of stare decisis, and binding upon all courts. We are here asked to sanction its violation, either on the ground that a valid exception to the rule is applicable, or that despite the uniformity with which the rule has been applied, it may be disregarded by lower tribunals without fear of

> prevention by the higher courts. This last point cannot be too strongly emphasized, for the rule will disappear unless this court is prepared to enforce it. (*Abelleira v District Court of Appeal* (1941) 17 Cal 2d 280, 293) (Id. at 5)

CONCLUSION

Almost all of the fees awarded at issue here were for reading (but never responding to) Defendants' filings necessary for compliance with this Court's Rule 14.1(g)(i), relating to our attempts to secure state court rulings on our Due Process and Equal Protection grievances.

This aspect of Rule 15.2 is vital: "Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." When the opposing party has filed its brief in opposition, this Court will be in a better position to determine the proper scope of Rule 10 limitations.

Certificate re Grounds for Rehearing

Self represented Appellants Michael Halliwell and James Parker hereby affirm that this Petition for Rehearing is submitted not for delay, and as the most feasible way of extricating themselves from the wave after wave of attorney fees awards, which has dragged out this aspect of *Paxinos v Halliwell & Parker* for more than two years after Defendants left the property.

We affirm that our Petition is a good faith effort to inform the Court of controlling developments since our previous submissions, to provide related new case law citations, and give a small amount of background to tie in with our October 13, 2009 Supplemental Brief.

_____

Michael Halliwell

_____

James Parker